

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

UNITED STATES OF AMERICA,

NO. CR. S-97-054 WBS  
Court of Appeals No. 05-10388

Plaintiff,

v.

ORDER DENYING CERTIFICATE OF  
APPEALABILITY

TANH HUU LAM,

Defendant.

-----oo0oo-----

By order filed in the Court of Appeals on July 27, 2005, Appellate Commissioner Peter L Shaw has ordered this court to issue an order either granting or denying a certificate of appealability in this action, pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b).

Because it is not clear to this court exactly what issues defendant seeks to raise on appeal, or what order he seeks to appeal from, it is difficult to identify "which specific issue or issues," if any, satisfy the showing required by section 2253(c)(2). See 28 U.S.C. § 2253(c)(3). The court will assume

1 that defendant seeks to appeal from this court's order of May 18,  
2 2005 denying reconsideration of its previous order of May 2,  
3 2005. If so, for the reasons expressed in its May 2 order, this  
4 court finds no issue that is debatable by jurists of reason,  
5 could be resolved differently by a different court, or is  
6 adequate to deserve encouragement to proceed further. See  
7 Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002).

8           This court's order of May 2, 2005 denied what was  
9 captioned as a Motion to Vacate Guilty Plea, pursuant to Rule  
10 11(e) of the Federal Rules of Criminal Procedure, and Rule 60(b)  
11 of the Federal Rules of Civil Procedure. Whether considered  
12 under those rules or under 28 U.S.C. § 2255, that motion lacked  
13 merit. The grounds asserted in support of defendant's motion  
14 were the same as those which were raised, or at least could have  
15 been raised, in his earlier motion under 28 U.S.C. § 2255 filed  
16 on October 22, 2002. The Court of Appeals affirmed this court's  
17 denial of that motion, and on January 21, 2005 denied defendant's  
18 request to file a second or successive motion.

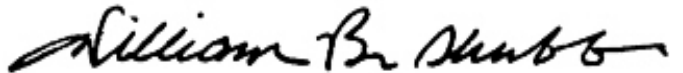
19           The filing of second or successive motions under  
20 section 2255 is prohibited unless the petitioner has obtained  
21 certification to do so from the Court of Appeals. 28 U.S.C. §  
22 2244. United States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998).  
23 Rule 60(b) may not be used to circumvent the prohibitions of  
24 section 2244. See Thomas v. Calderon, 151 F.3d 918, 920-21 (9th  
25 Cir. 1998). Defendant obtained no certification to file a  
26 successive motion, and there was no colorable claim of mistake,  
27 inadvertence, surprise, excusable neglect, newly discovered  
28 evidence, fraud, misrepresentation, or other misconduct of an

1 adverse party here. Cf. Rodwell v. Pepe, 324 F.3d 66, 60 (1st  
2 Cir. 2003), cited by defendant. Defendant's motion was therefore  
3 barred by the provisions of 28 U.S.C. § 2244.

4 For those reasons, a certificate of appealability is  
5 hereby DENIED. The Clerk of this court is directed to forward a  
6 copy of this Order to the Clerk of the United States Court of  
7 Appeals for the Ninth Circuit, for filing in its case No. 05-  
8 10388.

9 IT IS SO ORDERED.

10 DATED: August 1, 2005

11   
12

13 WILLIAM B. SHUBB  
14 UNITED STATES DISTRICT JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28